No. 11,852

IN THE

United States Court of Appeals

For the Ninth Circuit

VERNON H. SUTTLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

This is an appeal from a judgment of the District Court for the Territory of Alaska, Fourth Division, sentencing the defendant to imprisonment for five years in the Federal Penitentiary at McNeil Island, Washington. Said judgment was entered on the 24th day of December, 1948 (Tr. of R. 18), pursuant to a jury trial and verdict of "Guilty" (Tr. of R. 15) of the alleged crime of Assault with a Dangerous Weapon as charged in an Indictment (Tr. of R. 1) based on Sec. 4778 C.L.A., 1933, p. 906. Notice of appeal was filed on December 30, 1947 (Tr. of R. 23). The jurisdiction of the District Court was invoked under the Act of June 6, 1900, Chap. 786, 31 Stat. 322, as amended, 48 U.S.C. Sec. 101, likewise constituting Sec. 1091, C.L.A. 1933, p. 273. The jurisdiction of

this Court is invoked under Sec. 128 of the Judicial Code, as amended, 28 U.S.C., Sec. 225(a); now 28 U.S.C. New, Sec. 1291.

QUESTIONS PRESENTED.

Whether the allegations of the Indictment were sufficient to constitute a cause of action against the appellant; whether the appellant was confronted by witnesses; and whether the verdict of the jury was contrary to the evidence, as enumerated by the appellant at pages 3-7 of his brief. Vernon Suttle will be referred to herein as the appellant; and the United States of America, the plaintiff below, will be designated appellee herein. No special statutes are involved in this case.

STATEMENT OF THE CASE.

On the 26th day of October, 1947, near the hour of 4:00 o'clock, A. M. (Tr. of R. 58, 82), Leo Schlotfeldt was, in the company of his wife Agnes and friends, occupying a position at the bar of a local nightclub known as the "Talk of the Town" (Tr. of R. 28), situated in the southern outskirts of Fairbanks, Alaska. Also present near the bar was a soldier dressed in civilian clothes named Vernon Suttle (Tr. of R. 68, 70, 136). Suttle was engaged in a conversation with an Indian girl (Tr. of R. 36) and was standing just to the rear and slightly to the left of Schlotfeldt (Tr. of R. 29, 36). Some occasion arose causing Schlotfeldt to speak to the Indian girl

(Tr. of R. 29), whereupon his wife remarked in substance that he was talking to Clooches now" (Tr. of R. 29, 37); "Clooch being understood commonly as a highly uncomplimentary vernacular reference to full and part-breed native Indian girls. The Indian girl then remarked in substance that Schlotfeldt "also talked to white trash" (Tr. of R. 29, 37). Following this banter, Schlotfeldt left his place in a turning move (Tr. of R. 54) toward Suttle and the two grappled, after which time they were separated by a house-hired floorman (Tr. of R. 83, 94). Immediately following the separation, blood was observed on Schlotfeldt (Tr. of R. 84, 85), and a later examination disclosed numerous deep lacerations on his person (Tr. of R. 115). Also following the separation, the floorman observed a knife in Suttle's hand, which the former twisted from his grasp (Tr. of R. 83, 94). Schlotfeldt was taken to a local hospital. Suttle was placed under arrest and incarcerated. The scuffle was unique in that it lasted only a few seconds (Tr. of R. 31, 52).

ARGUMENT.

I.

THE ALLEGATIONS OF THE INDICTMENT ARE SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION UNDER THE PROVISIONS OF SECTION 4778, COMPILED LAWS OF ALASKA, 1933.

An analysis of appellant's first three points set forth in his Statement of Points, and argued in his brief under the first two titles, shows such inter-

relation of subject matter that separation seems quite awkward. For the purposes of this argument, these points will be combined.

Appellee desires to state at the outset that appellant was charged in the Indictment with having feloniously assaulted another with a dangerous weapon, an act made criminal in the Territory of Alaska under the provisions of Section 4778 of the Compiled Laws of Alaska, 1933. The charging portion of the Indictment was followed by the citation "Section 4771" which appeared as an overlooked typographical error. Appellee contends that the only issue logically existent concerning the indictment at bar is the effect of this erroneous citation. Appellee urges that such error is not ground for dismissal of the Indictment or for reversal of a conviction, as the error did not mislead the appellant to his prejudice. The acts set forth in the Indictment clearly define the crime charged and incorporates in substance the same terminology as appears in the statute.

Appellee desires to point out that the charge to which appellant pleaded was Assault with a Dangerous Weapon (Tr. of R. 3). Also, the verdict set forth the crime of "Assault with a Dangerous Weapon as charged in the Indictment." Appellee asserts that, other than the erroneous numerical citation appearing in the Indictment, no confusion of statutes can be shown.

For authority on the question of dismissal or reversal, appellee sets forth below Rule 7(c), Rules of Criminal Procedure for the District Courts of the

United States, 1946, made applicable to the Territory of Alaska under Rule 54 contained therein.

> "Rule 7. The Indictment and the Information. (C) Nature and Contents.
>
> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. *Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.*" (Italics ours.)

Supplementing the above, Paragraph 3 of Notes to Rule 7(c), page 17, states:

> "The law at present regards citations to statutes or regulations as not a part of the indictment. A conviction may be sustained on the basis of a statute or regulation other than that cited. *Williams v. United States,* 168 U. S. 382, 389; *United States v. Hutcheson,* 312 U. S. 219, 229.

> The provision of the rule, in view of the many statutes and regulations, is for the benefit of the defendant and is not intended to cause a dismissal of the indictment, but simply to provide a means by which he can be properly informed without danger to the prosecution."

Appellant's argument concerning the Indictment and covering his first three points has been searched in vain for any statement alleging prejudice, it dealing instead with numerous points of a highly abstract nature of an even doubtful technical significance; and being in substance so cross-reliant and cross-dependent as to suggest to appellee the lifting of one's self by one's own boot straps, against which proposition appellee finds analytical argument difficult. The subjects will be answered in the order in which they appear in appellant's brief.

Appellant's first and second points relied upon are that the allegations of the Indictment are not sufficient to constitute a cause of action against the appellant, nor do they constitute a crime under the provisions of Section 4771. Considering first the insufficiency of allegations to constitute a cause of action, appellee contends that the allegations are sufficient under Section 4778. The charging portion of the Indictment reads as follows:

> "On the 26th day of October, 1947, in the Territory of Alaska, Vernon H. Suttle, armed with an open-bladed pocket knife, which knife was then and there a dangerous weapon, feloniously assaulted Leo Schlotfeldt by cutting and wounding the said Leo Schlotfeldt about the neck, chest and leg with the open blade of said pocket knife."

Section 4778 reads:

> "Whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished in the penitentiary not more than ten years * * *"

Certainly the act charged as a crime, namely, Assault with a Dangerous Weapon, is clearly and distinctly set forth in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended.

Appellee does not know what portion of Section 4771 is combined with Section 4778 in the Indictment, as charged by appellant. The only words in common are the words "cut" and "wound" and these are not inconsistent with an act of assaulting.

Concerning penalties, appellee contends that the word "feloniously" appearing in the Indictment identifies the calibre of the offense charged and leaves no room for uncertainty or ambiguity resulting in prejudice.

Answering appellant's argument that the allegations in the Indictment do not constitute a crime under Section 4778 (Br. 6), appellee denies that appellant has any rational argument, short of asserting prejudice, which he has not done. The belief of appellant that he was appealing from a conviction of assault with intent to kill, wound, or maim, is not considered a genuine belief by appellee, in view of the positive identification contained in the verdict (Tr. of R. 15), among other things. What significance the acceptance

of service of the Notice of Appeal by the United States Attorney has is not known by appellee.

For answer to appellant's statement of incumbency upon the prosecution to prove that the pocket knife was a dangerous weapon, appellee respectfully directs attention to the testimony of a physician pertaining to same, appearing in the record (Tr. of R. 116), wherein the doctor states his opinion that the knife would be a dangerous weapon with the blade open. This, coupled with a view of the knife blade in fact used (Tr. of R. 106), certainly justified a jury with experience common to mankind to consider the instrument used as a dangerous weapon.

Appellee admits that the allegations contained in the Indictment do not constitute a cause of action under the provisions of Section 4771. Such was never intended.

Considering last the authorities appellant cites in support of his contentions, appellee desires to review same at this point. The only case believed to be pertinent to the case at bar is an Oregon case, *State v. Branton* (87 Pac. 535), which, interestingly enough, involves two Oregon Statutes from which the Alaskan Statutes 4771 and 4778 were copies, namely, Sections 1767 and 1771. Appellee quotes from the above case:

> "Section 1767 makes it a crime to assault another with intent to kill, and Section 1771, to assault another with such (dangerous) weapon. An Information charged an assault with a revolver by shooting and wounding with intent to kill HELD that, assuming that the Information charged the violation of Section 1771, as well as Section 1767,

it was not subject to demurrer therefor, since, under accusation of assault with intent to kill, defendant could have been convicted of assault with a dangerous weapon."

The Court cited as authorities, 1 Bishop New Crim. Law (Sec. 780); 1 McClain Crim. Law (Secs. 271, 272); and cases *State v. McLennen* (16 Pac. 879); *State v. Lavery* (58 Pac. 107); and *State v. Kelly* (68 Pac. 1). The above case, incidentally the best case appellee could find as argument against appellant's contentions even though cited by the latter, makes possible an otherwise duplicitous charge under two statutes, provided the less grave section premises the conviction. Appellee argues, *a priori,* that where the only reference to the more grave offense is by mistaken citation, and not combined in terminology of charge, no error results.

Considering the other cases cited by appellant, appellee denies that same have a bearing at bar, as they deal with Informations containing joinder of separate and distinct offense, namely, selling intoxicating liquor and conveying intoxicating liquor from one place in the State to another place in the State. In *Champett v. State* (109 Pac. 124), the State confessed error and reversal resulted, said error being the trial Court's denial of defendant's Motion to require the State to elect upon which offense charged in the Information it would prosecute. In *Scott v. State* (109 Pac. 240), the Court stated that a general verdict of guilty was not sufficiently certain to enable the Court to pronounce judgment.

II.

APPELLANT WAS CONFRONTED BY THE WITNESSES AGAINST HIM.

Considering appellant's argument of non-confrontation of witness, appellee urges that all testimonial evidence presented to the jury was by witnesses confronting the accused. This satisfies the constitutional guarantee of confrontation. The fact that the victim involved was not asked by the prosecution to testify concerning the incident would seem to have no bearing on the matter. The evidence presented to the jury was for the most part testimony of other eye witnesses who had viewed the incident (Tr. of R. 28, 46, 57, 67, 82, 92, 106).

Appellant's suggested application of the rule of confrontation would seem to give rise to impossible situations in cases of homocide or other incapacitation of victims. To assert in substance that a prosecution must fail if one assaulted does not, or cannot, testify against his assailant seems absurd.

Appellee desires to counter the inference raised by appellant's statement that Schlotfeldt testified that he did not know Vernon Suttle, and had never seen him until the preliminary hearing before the United States Commissioner, by attaching to same a character of negative pregnancy. Appellee urges this Honorable Court to consider the purported factual phrase "had never seen" as necessarily qualified by such propositions as consciousness, perception and memory.

Corpus Juris Secundum (Vol. 23, Sec. 999, p. 362) states, concerning the guarantee of confrontation by constitutional provision,

> "Confrontation has been defined as the act of setting a witness face to face with the prisoner, in order that the latter may make any objection he has to the witness, or that the witness may identify accused * * * Confrontation is, in its main aspect, however, merely another term for the test of cross-examination, and the main or principal purpose of the constitutional or statutory guarantee here under consideration is to assure the right of cross-examination; and in any event, the right of accused in this regard includes the right to cross examine the witnesses. The test of the right to cross-examination under the constitutional guarantee is not who calls the witness but the character of the testimony."

In this regard, appellee desires to state that appellant called as his own witness the victim, Leo Schlotfeldt, and propounded various questions to him (Tr. of R. 128, 129). Certainly, he had every opportunity to examine this witness at that time and to make any objection he desired to make.

Answering appellant's charge that a witness, namely, Mrs. Schlotfeldt, was not subpoenaed although she was in a position to have seen and heard the beginning of the alleged scuffle, appellee quotes from Corpus Juris Secundum (Vol. 23, Sec. 999, p. 363):

> "Right of accused under constitution to be confronted with witnesses does not require the prosecution to call any specific persons as witnesses,"

and cites as authority therefor, *Aycock v. U. S.*, 62 F. (2d) 612, certiorari denied 53 S. Ct. 595. Appellee desires to add that the reason the above-mentioned witness was not called by the prosecution could have been because she was unable to give a constructive account of the incident in question, having been incapacitated by alcohol at the time of the occurrence thereof.

III.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT A VERDICT OF GUILTY.

According to the testimony of seven eye witnesses (Tr. of R. 28, 46, 57, 67, 82, 92, 106), a fight occurred between the appellant and one Leo Schlotfeldt at a night club. Schlotfeldt was severely cut in five places on his person. A pocket knife identified to have been the cutting instrument (Tr. of R. 106) was seen in the appellant's hand during the cutting (Tr. of R. 59) and taken from him immediately thereafter (Tr. of R. 94). The fight was of remarkably short duration according to seven witnesses (Tr. of R. 31, 48, 59, 68, 83, 96, 109), one of whom, qualified as having professional fighting experience and therefore a good judge of time, testified that the whole incident lasted only ten or less seconds (Tr. of R. 96).

Certainly a jury would be justified in finding, in a barroom scuffle lasting scarcely long enough for numerous blows and a resulting overpowering by one with a compelling drastic defense by his opponent,

coupled with a view of the two participants for purposes of judging relative size, weight and strength, that the use of a knife was unjustified and therefore constituted an assault. Indeed, the jury could well believe that under such breathtaking celerity of action, the appellant must have had his knife in premeditated readiness before the actual scuffle began.

In view of the above account as set forth by the numerous witnesses above referred to, appellant's contention of lack of direct testimony of an assault committed by appellant seems wholly without merit. Commenting on the haziness of one of the prosecution's witnesses, one William Logan McIlroy, appellee desires to state that, without admitting a weakness in said testimony, the jury could place any degree of credibility it elected to such testimony and could, indeed, completely ignore same and still have ample evidence to justify its finding. Appellant's comprehensive charge that the witnesses "were evidently under the influence of intoxicating liquor" is unsupported by the record, although admittedly some had been drinking previously.

Answering appellant's argument of an overt movement by the victim toward the appellant, appellee urges that the jury, after hearing all the evidence, found that an assault by the appellant had been made and this necessarily contemplates consideration of self-defense. Elaborating on the testimony of one Holly Derrick as set forth in appellant's brief (Br. 9), appellee desires to start the testimony at its logical

beginning in order to give a complete picture. Appearing in the record, page 54, the following testimony of the said Holly Derrick appears:

> "Q. And then when these words, which you say were hostile words, that you didn't hear, were spoken to Mr. Schlotfeldt, he got off the stool, is that right?
>
> A. Yes.
>
> Q. Did he go toward Mr. Suttle?
>
> A. I guess they went toward each other. I don't know how they got together."

The above testimony seems to establish that the witness, Holly Derrick, could hardly have stated or inferred that Schlotfeldt was an aggressor. He merely stated in substance that he guessed that each went for the other, and the jury was so entitled to believe.

Considering the testimony of Lt. Flood appearing in appellant's brief (Br. 9), appellee desires to point out that this witness stated that he saw only one cut made, very shortly after which the fight was broken up (Tr. of R. 61). Bearing in mind that the victim suffered five cuts, the jury was justified in believing that some, if not all, of the other four cuts occurred before the victim made a kick at his opponent, the appellant.

Appellant states in his brief (Br. 10) that "no place in the record is there any testimony shown that the appellant was the aggressor in the present instance." Appellee quotes the following from the testimony of Francis Broderick (Tr. of R. 68):

"Q. Do you recognize that man?

A. Right there (indicating toward defendant). The man there. He had a red and black checkered jacket on at that time, or a shirt.

Q. That is the defendant sitting here?

A. The defendant there. And * * * (interrupting).

Q. Yes.

A. And I saw him take a pass at Leo (Schlotfeldt) and Leo made a half-jab and half-poke at him, and they came toward me. I was standing by the door, and from there I made a grab at Leo and I hollered at Leo and told him to quit fighting, and they went to the floor and I grabbed Leo by the coat and pulled him back up and pulled him against the door, and around into the corner. I told him then he wouldn't gain anything by fighting in a place like that. He would wind up in jail, and he said 'That son-of-a-bitch cut me.' That is the very words he used.

Q. By your statement of 'making a pass,' what do you mean by that?

A. Making a swing at him with his fist."

Appellee urges that appellant's statement that Mr. Schlotfeldt was the apparent aggressor is unfounded. Appellee, hesitating to assert who was the aggressor, contends that the evidence indicated that the scuffle was precipitated by simultaneous acts of both participants and that the jury was justified in finding that, under such circumstances, among others aforementioned, the appellant's use of a knife was unwarranted and criminal and constituted an assault with a dangerous weapon, as charged in the Indictment.

CONCLUSION.

For the reasons aforementioned, appellee respectfully prays that the jury verdict and sentence in the case at bar not be disturbed.

Dated, November 29, 1948.

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